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JURISDICTIONAL STATEMENT

Pursuant to section 512.020 of the Revised Statutes of Missouri, Supreme Court Rule 81, and Art. V, 3 of the Missouri Constitution, the Western District of the Missouri Court of Appeals correctly exercised jurisdiction over this appeal.

This is an action in tort wherein appellant sought damages from respondent for personal injuries. The trial court granted summary judgment in favor of the respondent on March 27, 1998, which was filed by the Clerk on April 8, 1998, such Order supposedly disposing of all issues and parties in that action. The trial court's Order became final on April 27, 1998 such that appellant's notice of appeal, filed on May 4, 1998, was timely filed within ten days of the trial court's Order becoming final, therefore complying with Rule 81.04(a).

The appeal to the Missouri Court of Appeals, Western District, No. 55794 was dismissed for lack of jurisdiction on June 22, 1999. The appellate court found that the trial court had failed to certify the judgment as final as required by Rule 74.01(b). Defendant Helen Marie Farren-Davis filed a Motion to Certify Summary Judgment as Final for Purposes of Appeal on March 16, 2000. The trial court sustained this motion and an Amended Order Granting Summary Judgment was filed on March 30, 2000. A Notice of Appeal was filed with the Missouri Court of Appeals, Western District on April 28, 2000 by the Appellant, Case No. 58536. The Court of Appeals held oral arguments in this case and rendered its opinion on March 27, 2001. The Court of Appeals affirmed summary judgment on behalf of Ms. Helen Marie Farren-Davis.

A Motion for Rehearing was filed with the Court of Appeals by Appellant on April 11, 2001 and denied on May 1, 2001. An Application for Transfer to the Supreme Court was

filed by Appellant on May 21, 2001 and sustained on June 26, 2001. This case was
transferred to the Supreme Court, Case No. 83637.

STATEMENT OF FACTS

A. Appellant's Violation of Rule 84.04(c) Requires Dismissal of the Appeal.

Appellant's Statement of Facts fails to comply with Rule 84.04(c) because the version of the facts set forth in appellant's brief does not correspond with the factual statements in the consecutively numbered paragraphs of respondent's motion for summary judgment. See Chopin v. American Auto. Ass'n of Missouri, 969 S.W.2d 248, 251 (Mo. App. S.D.1998). Respondent Helen Marie Farren-Davis filed a motion for summary judgment, and respondents William and Karen Davis filed a separate motion for summary judgment. (L.F. at 20, 49.) Even though appellant has alleged error by the trial court's failure to find a remaining genuine issue of material fact, he has not specified where, in the pleadings related to either motion for summary judgment, this factual issue was allegedly created. Specifically as to this respondent's motion for summary judgment, the statement of facts in appellant's brief does not identify the material facts established by the motion for summary judgment and appellant's response, and further does not identify the material facts pleaded in this respondent's motion and properly denied by appellant's response. Id. Rule 84.04(c) requires the appellant to set forth a concise statement of the facts "relevant to the questions presented for determination." In this case, the only questions presented in appellant's first point relied on for determination are whether "there is a genuine factual dispute" or if there is a duty owed by respondents "if the facts are proven as appellant alleges." (Aplt.'s Br., Point Relied On, p. 18.) As his brief fails to set forth the facts that allow this Court to determine whether there remained a genuine issue of material fact following his response to respondent's summary judgment motion, appellant's statement of facts violates Rule 84.04(c), such

violation constituting grounds for dismissal of the appeal.

Further, appellant has highlighted for the Court the statement of Karen Davis as it appears in a police document. (Aplt.'s Br., p. 6-8.) Such a statement is hearsay, and does not properly support any attempt to raise a genuine dispute as to any material fact properly supported by respondent's motion for summary judgment. See Rule 74.04(c)(2) ("shall support each factual statement asserted in the response with specific references to where each such fact appears in the pleadings, discovery or affidavits"); and Rule 74.04(e) ("affidavits . . . shall set forth such facts as would be admissible in evidence"). It is therefore inappropriate for this Court (and would have been inappropriate for the trial court) to consider the hearsay police report cited by appellant.

Notwithstanding the appellant's failure to meet his duty to define the scope of the controversy pursuant to Rule 84.04(c), see Chopin, 969 S.W.2d at 251 (citing Haynes Family Corp. v. Dean Properties, Inc., 923 S.W.2d 465, 466 (Mo. App. S.D. 1996), respondent Helen Marie Farren-Davis will set forth the facts before the trial court based on which the trial court properly entered summary judgment in her favor.

B. Appellant's Multiple Statements of Fact.

Appellant has filed two Statements of Fact in his brief. Any reference Respondent makes to Appellant's Statement of Facts are to the first Statement of Facts that appear, pages 6-12 of Appellant's brief. Additionally, Respondent points out that after page 12 of Appellant's brief, the page numbers start over with page 7 and skip page 14, seemingly repeating the same facts. This section is both duplicative and disorganized. As such, Respondent will refer to pages 6-12 of Apellant's brief as the asserted Statement of Facts.

Respondent further encourages the Court to give Appellant's Statement of Facts the due weight and credibility it deserves.

C. Relevant Uncontroverted Facts From Motion for Summary Judgment.

The trial court had before it the following facts when it ruled on the respondent Helen Marie Farren-Davis's motion for summary judgment. For the most part, citations to the Legal File reflect both the facts as set forth in respondent Helen Marie Farren-Davis's motion for summary judgment, and the response filed by appellant.

On September 13, 1992, plaintiff Joseph Moreland claims to have been stabbed by Ramon Gonzalez. (L.F. at 8.) The stabbing occurred entirely on the premises described as 3928 Terrace, Kansas City, Missouri ("the 3928 property"). (L.F. at 21, 37.) At all relevant times, the 3928 property was owned by William Davis and Karen Davis, and not by respondent Helen Marie Farren-Davis. (L.F. at 20, 35.)

In response to respondent Helen Marie Farren-Davis' motion for summary judgment, appellant asserted that Helen Marie Farren-Davis had an agreement with the owners of the 3928 property wherein the 3932 property tenants were allowed to park on the 3928 property. (L.F. at 35.) Examination of the record cited in support of appellant's attempt to controvert the issues of respondent's possession and control of property respondent did not own reveals that the record does not support appellant's contention. Specifically, respondent set forth in her motion:

> 1. At all relevant times, Helen Marie neither owned nor had possession or control of the 3928 property. (Deposition. of Karen Davis, p.12, 1. 22-25).

(L.F. at 21.) In response, appellant alleges that "substantial evidence suggests Helen Marie Farren-Davis exercised control over the back yard and garage area of 3828 Terrace through an agreement with her son and daughter-in-law to allow 3932 Terrace tenants to park behind 3928 Terrace. (Deposition. of Sheila Kay Lusher, pp. 169-170)." (L.F. at 35.) Ms. Lusher's testimony at those pages, (Ex. 4, pp. 169-70), which the trial court had the opportunity to

consider, (see Trans., pp. 3-6), has nothing to do with any agreement involving Helen Marie Farren-Davis. Rather, according to the cited testimony as set forth in the Transcript, (Trans., pp. 28-29; Ex. 4, p. 169), Ms. Lusher testified that she received permission to park on the 3928 property from Bill and Karen Davis, but there is no testimony that Helen Marie Farren-Davis had any agreement with the owners of the 3928 property regarding parking.

Appellant also alleged in response to respondent's motion that Helen Marie Farren-Davis had some knowledge that Ramon Gonzalez had violent propensities. (L.F. at 47.) However, the evidence cited to support his allegation, respondent Helen Marie Farren-Davis's deposition, is merely Mrs. Farren-Davis's unequivocal denial of any knowledge about Mr. Gonzalez's alleged past violent acts. Absent evidence to support his assertion, appellant boldly asserted that "[a] jury will believe otherwise." (L.F. at 47.) The trial court did not have before it any evidence to support appellant's contention regarding knowledge of violent propensities; therefore, appellant did not create any genuine issue of material fact precluding summary judgment. Miller v. Ernst & Young, 892 S.W.2d 387, 389 (Mo. App. E.D. 1995). The Miller court stated:

> The purpose underlying the requirements of Rule 74.04 is threefold: to apprize the opposing party, the trial court and the appellate court of the specific basis for the movant's claim of entitlement to summary judgment. It is not the function of an appellate court to sift through a voluminous record, separating fact from conclusion, admissions from disputes, the material from the immaterial, in an attempt to determine the basis for the motion. Because the purpose underlying the requirements of the Rule is directed toward benefitting the trial and appellate courts to expedite the disposition of cases, noncompliance with these requirements is not a matter subject to waiver by a party. To hold otherwise would place the court in the position of performing the work of an advocate. This court should not encourage noncompliance with that requirement of Rule 74.04

by performing a function properly that of counsel.

For the foregoing reasons, appellant's multiple violations of the Rules require dismissal of this appeal.

POINTS RELIED ON

I. The trial court was correct in granting summary judgment in favor of Helen Marie Farren-Davis, because appellant's first point relied on failed to comply with the mandatory requirements of Rule 84.04(d), in that plaintiff failed to set forth what issues existed regarding material facts or how the law was misapplied, wherefore, appellant has preserved nothing for review, and his appeal should be dismissed, or, alternatively, the trial court should be affirmed.

Rule 84.04(d)

Carrier v. City of Springfield,

852 S.W.2d 196 (Mo. App. S.D. 1993)

Sours v. Pierce,

908 S.W.2d 863 (Mo. App. S.D.1995)

Cosky v. Vandalia Bus Lines, Inc.,

970 S.W.2d 861 (Mo. App. S.D. 1998)

Mease v. McGuire,

886 S.W.2d 654 (Mo. App. S.D. 1994)

II. The trial court was correct in granting summary judgment in Helen Marie Farren-Davis's favor, because it is uncontroverted that the incident about which appellant complains did not occur on Mrs. Farren-Davis's property, in that Mrs. Farren-Davis owed no duty to appellant as a matter of law.

Fincher v. Murphy,

825 S.W.2d 890 (Mo. App. W.D.1992)

Groce v. Kansas City Spirit, Inc.,

925 S.W.2d 880 (Mo. App. W.D. 1996)

Advance Rental Centers, Inc. v. Brown,

729 S.W.2d 644, 646 (Mo. App. S.D. 1987)

Barefield v. City of Houston,

846 S.W.2d 399 (Tex. App. 1992)

III. The trial court was correct in granting summary judgment in Helen Marie Farren-Davis's favor, because even if Mrs. Farren-Davis knowingly allowed a dangerous person to reside at her property, which is denied, Mrs. Farren-Davis owed appellant no duty, in that she did not bring Gonzales into contact with appellant under circumstances affording a peculiar opportunity or temptation for misconduct.

Scheibel v. Hillis,

531 S.W.2d 285 (Mo. 1976) (en banc)

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,

854 S.W.2d 371 (Mo. 1993) (en banc)

Matt v. Burrell, Inc.,

892 S.W.2d 796 (Mo. App. S.D. 1995)

Zafft v. Eli Lilly and Company,

676 S.W.2d 241 (Mo. 1984) (en banc)

IV. The trial court was correct in granting summary judgment in favor of Helen Marie Farren-Davis, because there was no genuine issue of material fact and Helen Marie Farren-Davis was therefore entitled to judgment as a matter of law,

in that appellant's claim for negligent hiring and retention was only asserted against William and Karen Davis, and not Helen Marie Farren-Davis, according to the appellant's Petition, First Amended Petition, and per the Court of Appeals' opinions filed on June 22, 1999 and on March 27, 2001.

J.H. Cosgrove Contractors, Inc. v. Kaster,
851 S.W.2d 794 (Mo.App. W.D. 1993)

ITT Commercial Finance Corp. v.Mid-America Marine Supply Corp.,
854 S.W.2d 371 (Mo. 1993) (en banc)

Kilventon v. United Missouri Bank,
865 S.W.2d 741 (Mo. App. W.D. 1993)

Zafft v. Eli Lilly and Company,
676 S.W.2d 241 (Mo. 1984) (en banc)

Rule 74.01(b)

ARGUMENT

I.

The trial court was correct in granting summary judgment in favor of Helen Marie Farren-Davis, because appellant's first point relied on failed to comply with the mandatory requirements of Rule 84.04(d), in that plaintiff failed to set forth what issues existed regarding material facts or how the law was misapplied, wherefore, appellant has preserved nothing for review, and his appeal should be dismissed, or, alternatively, the trial court should be affirmed.

A. Standard of Review.

The requirements of Rule 84.04(d) are mandatory, and failure to comply with Rule 84.04(d) preserves nothing for review. Mease v. McGuire, 886 S.W.2d 654, 656 (Mo. App. S.D. 1994). In challenging the grant of a motion for summary judgment, the appellant must "state wherein and why material facts existed that would make summary judgment improper." Cosky v. Vandalia Bus Lines, Inc., 970 S.W.2d 861, 867 (Mo. App. S.D. 1998). The appellant is required to inform the Court and respondents "what part of the record on appeal shows that the trial court had anything before it from which it could have determined the existence of a genuine issue of material fact." Carrier v. City of Springfield, 852 S.W.2d 196, 198 (Mo. App. S.D. 1993). Appeals failing to comply with the requirements of Rule 84.04(d) preserve nothing for appeal, and must be dismissed. Thummel v. King, 570 S.W.2d 679, 684 (Mo. 1978) (en banc); Thomas v. Smithson, 886 S.W.2d 951, 952-53 (Mo. App. S.D. 1994).

B. Appellant's First Point Relied On Does Not Cite to Any Fact as to Which Appellant Claims the Trial Court Should Have Found a Genuine Material Issue Existed.

Appellant's first point relied on states in its entirety as follows:

THE TRIAL COURT ERRED IN GRANTING SUMMARY

JUDGMENT IN THIS CAUSE BECAUSE: (A) THERE IS A GENUINE FACTUAL DISPUTE THAT PRECLUDES A FINDING FOR SUMMARY JUDGMENT, AND (B) IF THE FACTS ARE PROVEN AS APPELLANT ALLEGES, THERE IS A DUTY OWED TO APPELLANT BY RESPONDENTS UNDER THE "SPECIAL FACTS" EXCEPTION TO THE RULE PRECLUDING LIABILITY FOR THE DELIBERATE CRIMINAL ATTACK OF A THIRD PARTY IN THAT RESPONDENTS KNEW OF THE DANGEROUS AND VIOLENT PROPENSITIES OF PLAINTIFF'S ATTACKER YET INCREASED THE RISK OF PHYSICAL HARM TO PLAINTIFF BY HIRING AND RETAINING THE ATTACKER AS AN EMPLOYEE AND PROVIDING HIM RENT-FREE, UTILITIES-PAID LODGING IN THE SAME BUILDING THAT PLAINTIFF LIVED IN.

Rule 84.04(d) requires that each point relied on "(A) identify the trial court ruling or action that the appellant challenges; (B) state concisely the legal reasons for the appellant's claim of reversible error; and (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error." Sup. Ct. R. 84.04(d)(1) (effective January 1, 1999). In this case, appellant seeks to challenge the trial court's entry of summary judgment in favor of respondents. In order to do so, appellant has the burden to establish that the trial court, on the record before it, should have found that there remained a genuine issue of material fact such that respondents were not entitled to judgment as a matter of law. Therefore, in order to preserve any issue for appeal from the grant of summary judgment, an appellant must set forth why the trial court erred by failing to find a factual dispute, or, why the trial court erred by finding that the respondents were entitled to judgment as a matter of law. Sours v. Pierce, 908 S.W.2d 863, 866 (Mo. App. S.D. 1995). Appellant's point relied on does neither, and his appeal must be dismissed.

Specifically, appellant maintains that there remains a "genuine factual dispute," but

fails to elucidate exactly what it is, and, appellant maintains that respondents would owe him a duty "if the facts are proven," but fails to elucidate what those facts are. In other words, appellant fails to tell this Court what the trial court should have considered, but did not, when it found that the uncontroverted facts demonstrated that respondents were entitled to judgment as a matter of law. The point relied on fails to preserve any error, and this failure is fatal to appellant's appeal.

II.

The trial court was correct in granting summary judgment in Helen Marie Farren-Davis's favor, because it is uncontroverted that the incident about which appellant complains did not occur on Mrs. Farren-Davis's property, in that Mrs. Farren-Davis owed no duty to appellant as a matter of law.

A. Standard of Review

This court is to affirm the trial court if, in reviewing the record before the trial court on summary judgment, this court finds that the uncontroverted facts demonstrate that respondent is entitled to judgment as a matter of law. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993) (en banc). The Court may affirm the trial court if it finds that respondent was entitled to judgment as a matter of law for any reason appearing in the record as presented to the trial court. Kilventon v. United Missouri Bank, 865 S.W.2d 741 (Mo. App. W.D. 1993); Zafft v. Eli Lilly and Company, 676 S.W.2d 241, 243 (Mo. banc1984). In other words, this Court reviews de novo the record submitted to the trial court on summary judgment, and is to affirm the trial court's grant of summary judgment if respondent is entitled to summary judgment for any reason. Id.

B. The Trial Court Should Be Affirmed Because Appellant Has Failed to Establish Circumstances Wherein Respondent Had a Duty to Protect Him While Not On the Owned Premises.

In order to prevail against respondent Helen Marie Farren-Davis, appellant must ultimately establish that he was owed two separate and distinct duties by Helen Marie Farren-Davis. First, appellant must establish that Helen Marie Farren-Davis owed him a duty to protect him from criminal attacks by a third party. Second, he must establish that Helen Marie Farren-Davis had a duty to protect him from such an attack while appellant was not on respondent's premises. For the reasons set forth below, appellant cannot meet his burden to establish either duty on the merits of the case.

Appellant's point relied on raises only the "special facts" exception to the rule precluding liability for landowners to protect invitees against deliberate criminal attacks by

third persons. (Aplt.'s Br., p. 11.) This exception applies "where 'a person, known to be violent, is on the premises, or an individual is present who has acted in such a way as to indicate danger' and sufficient time exists to prevent injury." Groce v. Kansas City Spirit, Inc., 925 S.W.2d 880, 885 (Mo. App. W.D. 1996) (emphasis added) (quoting Claybon v. Midwest Petroleum Co., 819 S.W.2d 742, 745 (Mo. App. E.D. 1991)). Appellant cites to no case where a landlord was found liable for an attack occurring off of the landlord's premises.

In order to support his position that liability may be imposed when an attack occurs off the premises, appellant cites the Groce case. Groce v. Kansas City Spirit, Inc., 925 S.W.2d 880 (Mo. App. W.D. 1996) (quoting Fincher v. Murphy, 825 S.W.2d 890 (Mo.App. W.D. 1992) (Aplt.'s Br. P 17.). However, the quote upon which the appellant relies is merely the plaintiff's argument in that case, which failed. The quoted language was not the holding. In fact, Groce supports the respondent's position. In Groce, an attack occurred off the premises and the defendant was held not liable for such attack. In cases asserting liability for acts occurring off the owner's premises, plaintiffs must plead and prove that the owner of the premises failed to "provide a safe means of ingress and egress to his premises..." Groce, 925 S.W.2d at 889 (quoting Hanks v. Mount Prospect Park Dist., 244 Ill.App.3d 212, 185 Ill.Dec. 1, 5, 614 N.E.2d 135, 139 (1993)). This holding is distinguishable from the facts in the present case because this case deals with an incident occurring off the premises, completely unrelated to ingress or egress.

"[A]n owner's duty to protect others grows out of the owner's ability to take reasonable steps on the owner's own property to protect others against foreseeable harm from

third parties.". Groce, 925 S.W.2d at 885 (emphasis added). The appellant's injuries occurred on property that respondent did not own or control.

> The defendant's duty to provide protection arises from his occupation of the premises. By occupying the premises the defendant has the power of control and expulsion over the third party. If a defendant does not occupy the premises, then he has no potential control or ability to oust a third party. The defendant therefore, is not liable for his failure to provide security when he does not control the premises upon which a third party assaults a plaintiff.

Barefield v. City of Houston, 846 S.W.2d 399, 403 (Tex. App. 1992) (quoted in Groce, 925 S.W.2d at 886 n.1).

In the present case, it is uncontroverted that the criminal attack resulting in appellant's injuries did not occur on respondent Helen Marie Farren-Davis's premises. Rather, the uncontroverted facts demonstrate that the alleged attack occurred entirely on the neighboring premises neither owned nor controlled by respondent Helen Marie Farren-Davis. Appellant has pointed to only one case where liability was imposed on a landowner for a criminal attack occurring off the premises, Fincher v. Murphy, 825 S.W.2d 890 (Mo. App. W.D. 1992), which is easily distinguishable from the present case.

In Fincher, the court found that a duty could extend across the property line "to an adjacent area where the danger was likely to appear, for some reasonable period of time." Id. at 893. The distinguishable facts in Fincher were that there was a hotly contested election taking place in the basement of the union headquarters. After the poles closed at 7:00 p.m., union members congregated outside of the building and began to drink heavily in anticipation of the results. Union officials were aware of this assembly, and were warned of threats of violence. Union officials knew exactly when the results would be answered. The union could have had law enforcement personnel present for the posting of the election results. The

sidewalk in front of the building was being repaired, the lawn was torn up, and the parking lot was not finished, so the union members gathered on the public street. The Fincher court extended liability beyond the premises because the mob of people were, for all intensive purposes, still on the union's property. During that specific period of time, they were not allowed to be inside the building where they would normally gather, due to the election and ballot counting. Predictably the mob was forced to gather outside on public property adjacent to the Union Hall due to the construction.

The case at hand is not at all analogous to that situation. There was no controversial activity taking place on the day in question. No special event at a specified time would be inciting violence. Neither Moreland nor Gonzalez was forced off the respondent's premises due to construction or for any other reason. It is uncontroverted that the attack resulting in plaintiff's injuries occurred without any specific warning to the respondents. Plaintiff testified in his deposition, which was before the trial court, that he was next door assisting respondent William Davis with lawnmower repair, when Gonzales shoved the appellant twice from behind. Gonzales then pulled a knife from under his shirt and stabbed the appellant. (Deposition. of Moreland, Ex. 2, pp. 39-41.) Mr. Moreland further testified that there was nothing William and Karen Davis could have done to stop the stabbing from taking place. (Deposition. of Moreland, Ex. 2, p. 97.) Respondent Helen Marie Farren-Davis was not conducting any specific activity, such as the union election in Fincher, that had a "sufficient connection" with Gonzales' criminal action. Unlike Fincher, the appellant's injuries in the present case occurred on a normal day devoid of any unusual circumstances that would create a duty for respondent Helen Marie Farren-Davis to protect the appellant once he left

respondent's premises. Moreover, absent some precipitating event, there is no way to measure the "reasonable period of time," Fincher, 825 S.W.2d at 893, during which Helen Marie Farren-Davis's duty extended past her property line. There is no reason for the court to extend liability in this case off the premises.

Appellant suggests that it was foreseeable that Gonzalez would go next door and injure someone. The court has held that crime is foreseeable at any time and any place. Meadows v. Friedman R.R. Salvage Warehouse, Div. Of Friedman Bros. Furniture Co., Inc., 655 S.W.2d 718, 721 (Mo. App. E.D. 1983). A "duty is not determined by the foreseeability of a criminal act, but upon whether a duty exists to take measure to guard against it." Id. This is a question of fairness, decided by "a weighing of the relationship involved, the nature of the risk, and the public interest in the proposed solution." Id.

A landlord is found to have a duty to make safe the common areas of an apartment complex, based on the fact that a landlord maintains control of these areas. Shields v. Wagman, 350 Md. 666, 673, 714 A.2d 881, 884 (1998). The courts look to the landlords ability to exercise some control and take steps to prevent injury. Scott v. Watson, 278 Md. 160, 165, 359 A.2d 548 (1976). In the case at hand, the injury did not occur on the common areas, or on the premises at all. It occurred on adjacent private property. As such, respondent had no ability to exercise control over the adjacent private property.

Missouri courts have wisely been hesitant to impose a duty on property owners to protect invitees from criminal attacks occurring off the premises. In Groce, the victim had attended a large public festival hosted by the defendants, and was injured by a criminal assailant while en route to his car, which was parked a short distance from the festival grounds. The Groce court refused to impose liability on the festival's promoters for an injury

occurring off the festival grounds because there was no evidence that the festival affirmatively created or increased the risk of attack in the area where it occurred. Groce, 925 S.W.2d at 888. "[T]he 'violent crimes' exception is normally applied only when the attack took place on the owner's premises, for once a person has left the premises of the owner, the owner normally has no greater ability to protect the person from harm than would any other member of our society." Id. at 885 (emphasis added).

The present facts illustrate the soundness of the Groce court's reasoning. The basis of the Fincher court's ruling was that the union could have called the police to disperse the crowd near its building prior to the foreseeably incendiary announcement of the election results. In other words, the premises owner in Fincher had the ability to take precautionary action on the public property near its premises, and reason to do so. In the present case, respondent Helen Marie Farren-Davis was powerless to oust Gonzales from or keep him from going onto the neighboring premises. The fact that Helen Marie Farren-Davis is related to the neighbors puts her in no better position to protect her tenants while they are visiting next door. Where would appellant have this Court draw the line? Does Helen Marie Farren-Davis have a duty to protect her tenants anywhere they go off her property? Helen Marie Farren-Davis was not conducting an activity on her premises that was the catalyst for the injury, as required by Groce, 925 S.W.2d at 887. Appellant cannot establish that respondent Helen Marie Farren-Davis had a duty to protect him from criminal attacks away from the owned premises. It is uncontroverted that there was no such activity, and the trial court properly entered judgment as a matter of law in favor of respondent Helen Marie Farren-Davis.

III.

The trial court was correct in granting summary judgment in Helen Marie Farren-
Davis's favor, because even if Mrs. Farren-Davis knowingly allowed a dangerous person
to reside at her property, which is denied, Mrs. Farren-Davis owed appellant no duty,
in that she did not bring Gonzales into contact with appellant under circumstances
affording a peculiar opportunity or temptation for misconduct.

A. Standard of Review

This court is to affirm the trial court if, in reviewing the record before the trial court
on summary judgment, this court finds that the uncontroverted facts demonstrate that
respondent is entitled to judgment as a matter of law. ITT Commercial Finance Corp. v. Mid-
America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The Court may affirm
the trial court if it finds that respondent was entitled to judgment as a matter of law for any
reason appearing in the record as presented to the trial court. Kilventon v. United Missouri
Bank, 865 S.W.2d 741 (Mo. App. W.D. 1993); Zafft v. Eli Lilly and Company, 676 S.W.2d
241, 243 (Mo. banc 1984). In other words, this Court reviews de novo the record submitted
to the trial court on summary judgment, and is to affirm the trial court's grant of summary
judgment if respondent is entitled to summary judgment for any reason. Id.

B. Appellant's Failure to Allege Any Circumstances Created by Respondent Affording Gonzales a Peculiar Opportunity for Misconduct Entitles Respondent to Judgment as a Matter of Law Since She Has No Duty to Appellant.

In Scheibel v. Hillis, 531 S.W.2d 285 (Mo. 1976) (en banc), the court held that the
plaintiff's petition could withstand a motion to dismiss by alleging that the defendant
increased the risk of danger to the plaintiff by keeping a loaded shotgun on her property with
the knowledge that the assailant was likely to use the gun to injure people on the property.
The Scheibel court found the possibility of a valid cause of action in Restatement (Second)

of Torts, 302B, which requires that one anticipate criminal acts of others if she has brought a person peculiarly likely to commit intentional misconduct into contact with others "under circumstances which afford a peculiar opportunity or temptation for such misconduct." Id. at 288.

The record is void of any properly supported fact tending to prove that respondent Helen Marie Farren-Davis had created a peculiar opportunity for Gonzales to attack appellant with a knife. There is no allegation, as there was in Scheibel, that Helen Marie Farren-Davis brought victim and assailant together on the day of the attack. There is no allegation, as there was in Scheibel, that Helen Marie Farren-Davis provided Gonzales with easy access to a weapon. Appellant was obligated to come forward, in response to respondent Helen Marie Farren-Davis's properly supported motion for summary judgment, with properly supported facts that created a colorable controversy as to whether he was owed a duty by Helen Marie Farren-Davis. Appellant failed to come forward with any such evidence, and the trial court properly entered summary judgment in respondent's favor. The trial court should therefore be affirmed.

IV.

The trial court was correct in granting summary judgment in favor of Helen Marie Farren-Davis, because there was no genuine issue of material fact and Helen Marie Farren-Davis was therefore entitled to judgment as a matter of law, in that appellant's claim for negligent hiring and retention was only asserted against William and Karen Davis, and not Helen Marie Farren-Davis, according to the appellant's Petition, First Amended Petition, and per the Court of Appeals' opinions filed on June 22, 1999 and March 27, 2001.

A. Standard of Review

This court is to affirm the trial court if, in reviewing the record before the trial court on summary judgment, this court finds that the uncontroverted facts demonstrate that respondent is entitled to judgment as a matter of law. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The Court may affirm the trial court if it finds that respondent was entitled to judgment as a matter of law for any reason appearing in the record as presented to the trial court. Kilventon v. United Missouri Bank, 865 S.W.2d 741 (Mo. App. W.D. 1993); Zafft v. Eli Lilly and Company, 676 S.W.2d 241, 243 (Mo. banc1984). In other words, this Court reviews de novo the record submitted to the trial court on summary judgment, and is to affirm the trial court's grant of summary judgment if respondent is entitled to summary judgment for any reason. Id.

B. THE TRIAL COURT SHOULD BE AFFIRMED BECAUSE APPELLANT PLED THAT WILLIAM AND KAREN DAVIS WERE NEGLIGENT IN HIRING AND RETAINING GONZALEZ, BUT DID NOT PLEAD THAT RESPONDENT WAS NEGLIGENT IN HIRING AND RETAINING GONZALEZ, SO THE TRIAL COURTS ORDER FOR SUMMARY JUDGMENT, AS TO ALL OF APPELLANT'S CLAIMS AGAINST RESPONDENT, WAS A FINAL ORDER PURSUANT TO RULE 74.01(B), AND IS CORRECTLY BEFORE THIS HONORABLE COURT.

Appellant's second point relied on states in its entirety as follows:

> THE TRIAL COURT'S AMENDED SUMMARY JUDGMENT ORDER DOES NOT ADDRESS APPELLANT'S CLAIM OF NEGLIGENT HIRING AND RETENTION BY RESPONDENT HELEN MARIE FARREN-DAVIS, AN ISSUE NOT ADDRESSED IN RESPONDENT'S SUMMARY JUDGMENT MOTION WHICH RAISES ONLY A PREMISES-LIABILITY DEFENSE, AND THEREFORE THE TRIAL COURT COULD NOT GRANT SUMMARY JUDGMENT PURSUANT TO RULE 74.04 TO PRECLUDE A THEORY OF RECOVERY FOR NEGLIGENT HIRING AND RETENTION.
>
> WHEREFORE, THE COURT'S AMENDED ORDER GRANTING SUMMARY JUDGMENT PURPORTING TO

> DISPOSE "OF ALL CLAIMS ALLEGED BY PLAINTIFF AGAINST DEFENDANT HELEN MARIE FARREN-DAVIS" IS UNLAWFUL AND IN CONTRAVENTION OF RULE 74.04.

Rule 74.01(b) states that "[t]he court may enter a judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay." Sup. Ct. R. 74.01(b) (effective January 1, 1999). The trial court entered its first Order Granting Summary Judgment on March 27, 1998. The appellant subsequently filed an appeal with the Court of Appeals, Western District. An opinion was filed by the Court of Appeals on June 22, 1999, whereby the facts and circumstances of the underlying case were set forth and the appeal was dismissed for lack of jurisdiction.

The plain reading of this court's opinion is that the first Order by the trial court for summary judgment was not final because:

> [It] did not completely dispose of the appellant's claim for damages against the respondents, William and Karen Davis, in that... it did not dispose of the claim on the alternative theory of negligent hiring and retention. As such, the judgment of the trial court was not final as to William and Karen, depriving us of jurisdiction as to the appellant's claim against them.

This language quite clearly states that the negligent hiring and retention claim is asserted against William and Karen Davis only. The trial court entered an Amended Order for summary judgment on March 30, 2000. This opinion stated that "This Order disposes of all claims alleged by plaintiff against defendant Helen Marie Farren-Davis. Pursuant to Rule 74.01(b), this Court designates its Judgment as final for purposes of appeal with no just reason for delay." As previously stated by the court, "unless otherwise expressly provided by rule or law, our jurisdiction is limited to appeals from final judgments."

The appellant is merely trying to get yet another bite at the apple by now alleging Helen Marie Farren-Davis was negligent in hiring and retaining Gonzalez. In both the

plaintiff's Petition and the plaintiff's First Amended Petition, the appellant pled that "Ramon Gonzalez at all times relevant hereto was an employee of the defendants William Davis and Karen Davis." (Aplt.'s Br., p. 30-31) (emphasis added). There is no mention of Helen Marie Farren-Davis. Implicit to a cause of action for negligent hiring and retention, "is the threshold requirement that the plaintiff prove that an employer-employee relationship existed between the defendant and the tortfeasor." J.H. Cosgrove Contractors, Inc. v. Kaster, 851 S.W.2d 794, 798 (Mo.App. W.D. 1993). Appellant has failed to prove that an employer-employee relationship existed between Gonzalez and respondent.

Respondent also pled that "Defendants, jointly and severally, were negligent in one or more of the following respects:..." Appellant then lists a number of causes of action, labeled a through i, of which appellant alleges only one need apply for respondent to have been negligent. Specifically, paragraph (e) which states "failing to evict Ramon Gonzalez prior to the attack"could be the one negligent act pled against respondent. (Aplt.'s Br., p. 30-31). William and Karen Davis could then be jointly and severally liable for the rest of the allegations contained within this section. This allegation fails to state which one of the nine listed possibilities is attributed to respondent. An employer-employee relationship between Gonzalez and respondent, which is required to maintain a cause of action for negligent hiring and retention, has not been pled against respondent. J.H. Cosgrove Contractors, Inc. v. Kaster, 851 S.W.2d 794, 798 (Mo.App. W.D. 1993). Therefore, even this argument by appellant fails. Appellant is requesting relief for a claim that was not brought before any court. The trial courts Order was a final order and was properly before the Court of Appeals.

Summary judgment was correctly granted by the trial court and the Court of Appeals and this

ruling should be affirmed.

CONCLUSION

WHEREFORE, for the above-stated reasons, Respondent Helen Marie Farren-Davis respectfully requests that this Court uphold the trial court's and the Court of Appeals' affirmation of summary judgment in favor of Helen Marie Farren-Davis.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the original and ten copies, along with a computer disk, of the above document was mailed, via Federal Express, this day of August, 2001, to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the word count of this Brief is 8,133 words, and that it fully complies with the limitations of Supreme Court Rule 84.06. Additionally, I hereby certify that I have filed a disk containing this Brief with the Court and that it has been scanned for viruses and is virus-free.

_____ . . . .

Attorney for Respondent
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